5-24-2017

State v. Greub Respondent's Brief Dckt. 44747

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44747**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2016-8470-FE**
	)	
ROSA L. GREUB,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature Of The Case

Rosa L. Greub appeals from her conviction for possession of methamphetamine. Specifically, she challenges the denial of her motion to suppress evidence.

Statement Of The Facts And Course Of The Proceedings

The state charged Greub with possession of methamphetamine. (R., pp. 49-50.) She moved to suppress evidence "obtained by officers resulting from defendant's contact with Pocatello Police." (R., pp. 51-52.) After a hearing on the motion (Tr., pp. 5-46), the district court made the following factual findings:

> Defendant Rosa L. Greub ("Defendant") was parked in a parking lot in Pocatello between 3:30 p.m. and 4:00 p.m. on June 10, 2016, when Officer Christ of the Pocatello Police Department drove into the parking lot to complete an accident report. Upon entering, Officer Christ saw Defendant's car in the back corner of the parking lot and saw her stare at him in what he perceived to be a startled manner. Officer Christ parked his patrol car perpendicular to Defendant's car, either 23 feet or 15 yards away, and did not have his interior [sic] lights flashing. Officer Christ, in uniform, approached Defendant to ask her what her business was there. Defendant replied that she was on her way to work, but stopped to smoke a cigarette because her employer did not allow its employees to smoke on the premises. Officer Christ did not see a cigarette and saw that Defendant was wearing a uniform.
>
> Officer Christ asked her [to] provide her driver's license, which she could not provide. Instead Defendant provided an identification card and confirmed that the address on it was current. Officer Christ next asked if she had "anything illegal," such as alcohol, drugs, or prescription medications, to which Defendant responded that she did not. Defendant testified at the hearing that Officer Christ persisted in asking her if she had anything illegal, and asked "If I look in your vehicle, will I find anything?" Officer Christ testified that he asked Defendant if he could search her vehicle and that

> Defendant said "Sure." Defendant also testified that she agreed to Officer Christ searching her car.
>
> During this questioning, Officer Christ observed that Defendant appeared nervous because she averted her eyes from him. Officer Christ does not recall when he returned Defendant's identification to her.
>
> After Defendant agreed to the search, Officer Christ asked Defendant to step out of the car, and he called a second unit to assist him because he was the only officer there and was not sure whether Defendant had any weapons. Defendant held her purse as she stepped out of the car, but Officer Christ told her to leave her purse in the car for safety purposes, which Defendant did. Before the second officer, Officer Buetts, arrived, Officer Christ directed Defendant to stand in front of his patrol car while he began searching the car. By the center console between the driver's seat and passenger seat, Officer Christ saw a brown paper bag with the red cap of what he perceived to be a whiskey bottle protruding from the top. He noted that the seal had been broken.
>
> At this time, Officer Christ stopped his search and talked with Defendant about the bottle he found in her car because he wanted backup before proceeding any further. He testified that it [was] standard procedure for a second officer to stay with the person while the other officer conducts the search for safety purposes. Because it was taking Officer Buetts an extended amount of time to arrive, Officer Christ decided to continue his search without Officer Buetts because he did not want to make Defendant late for work. Officer Christ searched behind the passenger area, then searched Defendant's purse in which he found methamphetamine. After arresting Defendant, Officer Buetts arrived and Officer Christ searched Defendant's purse a second time and found a pipe.

(R., pp. 84-86.)

The district court denied the suppression motion. (R., pp. 84-99.) Relevant to this appeal, the district court concluded that Greub had given voluntary consent to search her car and the containers therein, including her purse, and had not revoked or limited that consent when she initially attempted to remove the purse from the car. (R., pp. 90-99.)

Greub entered a conditional guilty plea, preserving her right to challenge the denial of the suppression motion. (R., pp. 114, 120-21; 10/11/16 Tr., p. 1, Ls. 12-15.) She filed an appeal timely from the entry of judgment. (R., pp. 136-38, 142-44.)

ISSUE

Greub states the issue on appeal as:

> Did the district court err when it denied Ms. Greub's motion to suppress?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Greub failed to show clear error in the district court's finding that she did not revoke her consent in relation to her purse?

ARGUMENT

Greub Has Failed To Show Clear Error In The District Court's Finding That She Did Not Revoke Her Consent In Relation To Her Purse

A. Introduction

The district court held that Greub's act of grabbing her purse as she prepared to step out of the car was not an "unequivocal act" revoking her previously given consent, and "under the circumstances in this case" Greub "did not revoke her consent." (R., pp. 93-95.) Citing cases addressing the scope of a search of a car incident to the arrest of the driver as "instructive," Greub argues purses should be granted "special" status such that her grabbing the purse after she was instructed to exit the car must be interpreted as revocation of consent. (Appellant's brief, pp. 7-12.) Greub's request for a special rule related to purses is without legal merit, and her argument that the district court erred when it reviewed all the circumstances fails.

B. Standard Of Review

"The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, [the appellate court] accepts the trial court's findings of fact that are supported by substantial evidence, but [the court] freely reviews the application of constitutional principles to the facts as found." State v. Faith, 141 Idaho 728, 730, 117 P.3d 142, 144 (Ct. App. 2005). A district court's finding that consent was not revoked is reviewed to determine if it was "clearly erroneous." State v. Thorpe, 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct. App. 2004).

C. Greub Has Failed To Show Clear Error In The District Court's Determination That Her Act Of Grabbing Her Purse Was Not An Act Clearly Inconsistent With The Consent She Had Just Given

"A valid consent dispels the necessity for a search warrant. Indeed, it has been suggested that consent—like the plain view doctrine—dispels application of the fourth amendment itself." State v. Rusho, 110 Idaho 556, 560, 716 P.2d 1328, 1332 (Ct. App. 1986). Because the object of the requested search included drugs (R., pp.85, 92), "it was objectively reasonable for the police to conclude that the general consent to search [Greub]'s car included consent to search containers within that car which might bear drugs." Florida v. Jimeno, 500 U.S. 248, 251 (1991). Greub does not challenge the district court's determination that she gave voluntary consent to search her car, including containers therein. (See, generally, Appellant's brief.)

"Even if consent has been given, expressly or impliedly, it may be revoked, thereby terminating the authority of the police to continue a warrantless search." Rusho, 110 Idaho at 560, 716 P.2d at 1332. "'[C]onduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.'" United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005) (brackets original) (quoting Burton v. United States, 657 A.2d

741, 746–47 (D.C. App. 1994) (footnotes omitted)).[1] "For example, the closing and locking a car trunk and the shutting of a bedroom door are acts that courts have held to be express revocations of consent. Conversely, courts have held that an equivocal act or statement cannot reasonably be interpreted as conveying an indication that consent has been withdrawn." Burton, 657 A.2d at 747 (citing cases). "[E]quivocal conduct can be construed in many different ways and it, therefore, does not pass muster under an objective reasonableness test." Id. at 748 (putting hand over pocket but then removing it when instructed not unequivocal withdrawal of consent). See also Sanders, 424 F.3d at 775 (applying unequivocal conduct standard, and finding that blocking the search of a pocket five times unequivocally withdrew consent).

The district court applied the correct legal standard and concluded Greub had granted consent to search the entire car, including the purse, and her conduct of grabbing her purse but then leaving it when instructed "was not clearly inconsistent with her consent to the search of her car, nor was it a clear and unequivocal act to prevent Officer Christ from searching her purse." (R., p. 95.) Finding the facts of the case closer to Burton than Sanders, the court held that Greub "did not revoke her consent." (Id.) The district court's analysis is correct.

Greub consented to a search of her car for "'anything illegal'" including "alcohol, drugs or prescription medications." (R., p. 85.) Such items could

[1] "Effective withdrawal of consent requires unequivocal conduct, in the form of either an act, statement, or some combination of the two, that is inconsistent with the consent to the search previously given." State v. Wellard, No. 43511, 2016 WL 4413238, at *2 (Ct. App. 2016) (unpublished) (citing Burton, 657 A.2d at 748). See also State v. Lawrence, No. 38555, 2011 WL 11067233, at *2 (Ct. App. 2011) (unpublished).

certainly have been in her purse, and thus the purse was within the scope of the search. (R., pp. 91-92.) After obtaining consent to search, the officer asked Greub "to step out of the car" so he could conduct the search. (R., pp. 85-86.) Greub grabbed her purse, but the officer "told her to leave her purse in the car for safety purposes, which Defendant did." (R., p. 86.) The officer began the search, and found an open container of alcohol. (Id.) He stopped the search to discuss what he had found with Greub. (Id.) After discussing the alcohol, the officer resumed the search, and searched the purse, in which he found methamphetamine. (Id.)

Under these facts, the act of grabbing the purse after granting consent to search and after being instructed to step out of the car was, at best, ambiguous. Grabbing the purse may have been a habitual action undertaken every time Greub exited the car. It may have been based on a desire to have or get something out of the purse (such as a cell phone or cigarettes) while she was waiting for the search to conclude. It was not clearly inconsistent with the consent to search just given, and was therefore not an unequivocal withdrawal or revocation of that consent.

Moreover, when instructed to not take the purse (for officer safety, not to alter the scope of the consent), Greub did not articulate any desire that the purse not be searched. Nor did she express any withdrawal of consent when the officer discussed the open container of alcohol he discovered in the initial stages of the search. The officer's belief that the purse was still within the scope of the consent when he searched it was not unreasonable under the facts of this case.

Greub argues that the fact it was her purse she grabbed, as opposed to some other container, is enough alone to show the officer no longer reasonably believed the consent extended to the purse. (Appellant's brief, pp. 8-12.) Specifically, she cites to cases addressing whether the purse of a passenger is within the scope of a search of a car incident to the arrest of the driver and contends that whether her purse could be properly searched should hinge on whether she voluntarily left it in the car after being instructed to exit the vehicle. (Id.) This argument is not based on the applicable legal standard and does not withstand analysis.

In State v. Newsom, 132 Idaho 698, 979 P.2d 100 (1998) (cited Appellant's brief, p. 9), Newsom challenged the district court's determination that an officer's search of her "purse was lawful incident to the arrest of the driver of the vehicle." Id. at 699, 979 P.2d at 101. The Court held that the search incident to arrest exception "does not authorize the search of another occupant of the automobile merely because the other occupant was there when the arrest occurred." Id. at 700, 979 P.2d at 102. The Court noted that Newsom had testified that the purse was on her lap, but when she tried to take it with her upon exiting the car the officers ordered she leave it behind. Id. Under such circumstances "the passenger's purse was entitled to as much privacy and freedom from search and seizure as the passenger herself." Id.

The Court also addressed the search of a passenger's purse incident to the arrest of the driver in State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000) (cited Appellant's brief, p. 10). In that case, however, unlike in Newsom, Holland

voluntarily left her purse behind when asked to exit the car. Id. at 160, 15 P.3d at 1168. See also State v. Watts, 142 Idaho 230, 234-35, 127 P.3d 133, 137-38 (2005) (cited Appellant's brief, pp. 10-11). In reaching the opposite conclusion as in Newsom, the Court stated that "*Newsom* stands for the proposition that the police cannot create a right to search a container by placing it within the passenger compartment of a car or by ordering someone else to place it there for them." Holland, 135 Idaho at 163, 15 P.3d at 1171; see also Watts, 142 Idaho at 235, 127 P.3d at 138 ("Watts is not entitled to the 'exception to the *Belton* exception' provided in *Newsom,* in which the officer ordered Newsom to leave her purse in the car.").

Greub concludes that the "takeaway from *Newsom, Holland,* and *Watts* is that the police cannot create a right to search by thwarting an individual's attempt to restrict the scope of the police's search." (Appellant's brief, p. 11 (internal quotes omitted).) Even assuming the merits of this extrapolation,[2] the flaw in this argument is that it begs the question. Greub consented to a search of her car for alcohol and drugs, which included consent to search the purse in the car. The question, then, is not whether the officer "creat[ed] a right to search" the purse by insisting that Greub not take it with her. This is not what the district court held, and the state concedes the obvious point that the officer was bound by any

[2] The state does not believe that the cited cases stand for the proposition that a defendant may unilaterally "restrict the scope of the police's search," but rather merely define the legal scope of the search incident to arrest exception to the warrant requirement. The state sees no obvious reason to expand cases defining the scope of the search incident to arrest exception to also define the scope of consent. See State v. Easterday, 159 Idaho 173, 357 P.3d 1281 (Ct. App. 2015) (declining to extend the rationale of Newsom to the context of the automobile exception).

withdrawal of consent. The relevant question is whether Greub withdrew the previously granted consent by attempting to take the purse with her. Greub does not argue how the grabbing of the purse was a withdrawal of consent, but merely assumes it was. (Appellant's brief, p. 11 (grabbing the purse when being asked to exit the car "was an attempt to restrict [the] search of it").) This mere assumption falls far short of meeting Greub's burden of showing clear error in the district court's finding that her act of grabbing the purse, under the circumstances of this case, was not an unequivocal withdrawal of consent.

The district court applied the correct legal standards and concluded that Greub's act of grabbing her purse when asked to exit the car was not an act clearly inconsistent with the previously granted consent to search. Greub does not challenge this finding as clear error under the relevant legal standards, but instead requests application of a legal standard that she has failed to show is relevant. Greub has failed to show clear error by the district court.

CONCLUSION

The state respectfully requests this Court to affirm Greub's judgment of conviction.

DATED this 24th day of May, 2017.

_/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24th day of May, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

__/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
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KKJ/dd